

89-1182

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Supreme Court, U.S.

FILED

JAN 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

COMMONWEALTH OF KENTUCKY

PETITIONER

versus

CHARLES DAVID JOHNSON

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

I.

DOES FOURTH AMENDMENT PERMIT POLICE OFFICERS WHO HAVE MADE "TERRY" STOP TO FOLLOW INDIVIDUAL INTO MOTEL ROOM WHEN INDIVIDUAL HAS INDICATED INTENT TO REJOIN OFFICERS MOMENTARILY AND OFFICERS HAVE REASON, BASED UPON SPECIFIC AND ARTICULABLE FACTS, TO BELIEVE INDIVIDUAL IS POTENTIALLY DANGEROUS AND MAY GAIN ACCESS TO WEAPONS WHILE IN ROOM?

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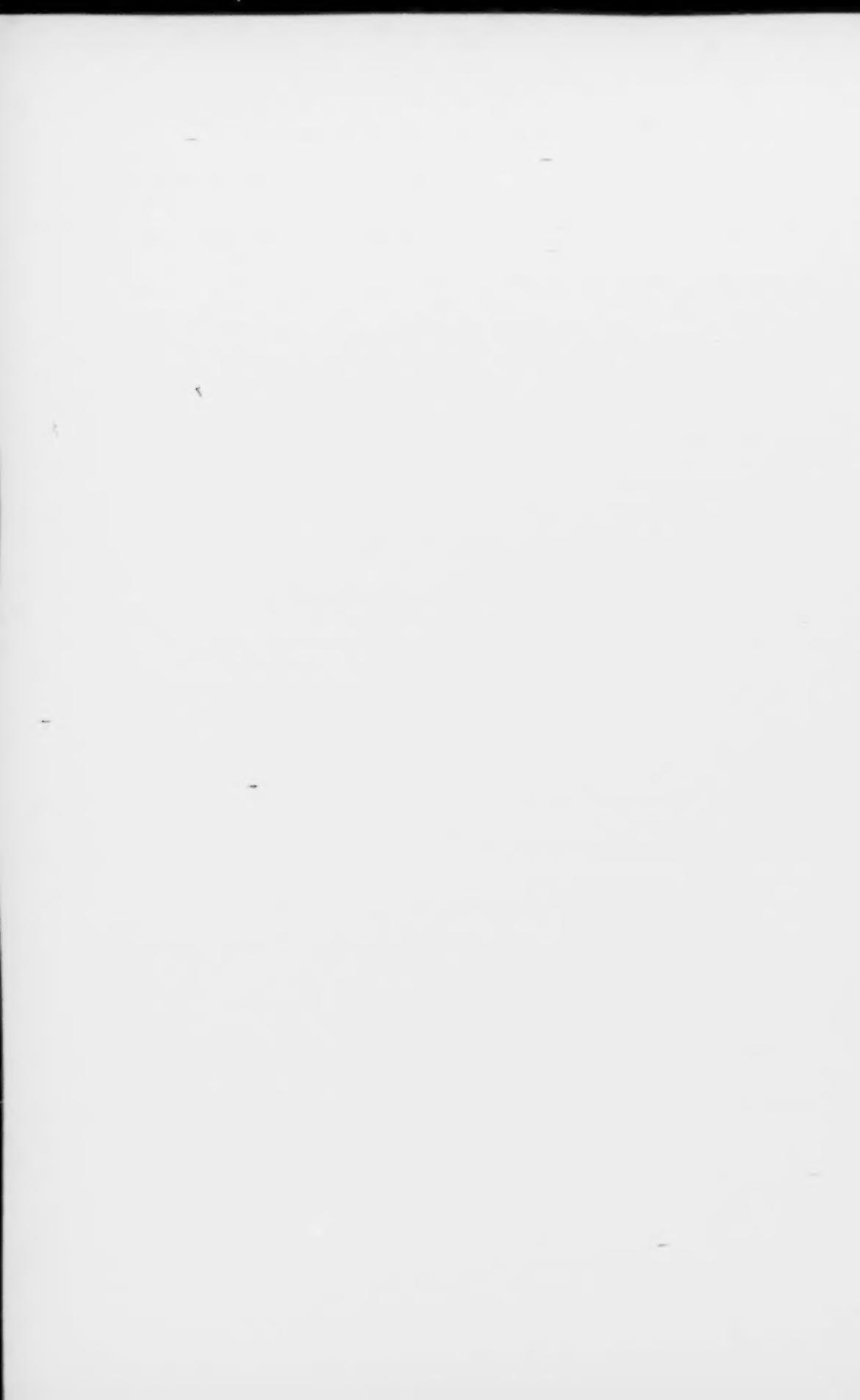
The Attorney General of Kentucky respectfully petitions this Court for a writ of Certiorari to review the judgment of the Kentucky Supreme Court.

OPINION BELOW

The opinion of the Kentucky Supreme Court is reported as Commonwealth v. Johnson, 777 S.W.2d 876 (Ky. 1989). The opinion of the Kentucky Court of Appeals is copied in the appendix to this petition. Johnson v. Commonwealth, 86-CA-748-MR and 86-CA-1305-MR, Slip Op. (2/19/88).

JURISDICTION

The opinion below by the Kentucky Supreme Court was originally issued on June 8, 1989, and became final on November 9, 1989, when the Kentucky Supreme Court entered an order denying the Commonwealth's timely petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).



CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States

Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

[n]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

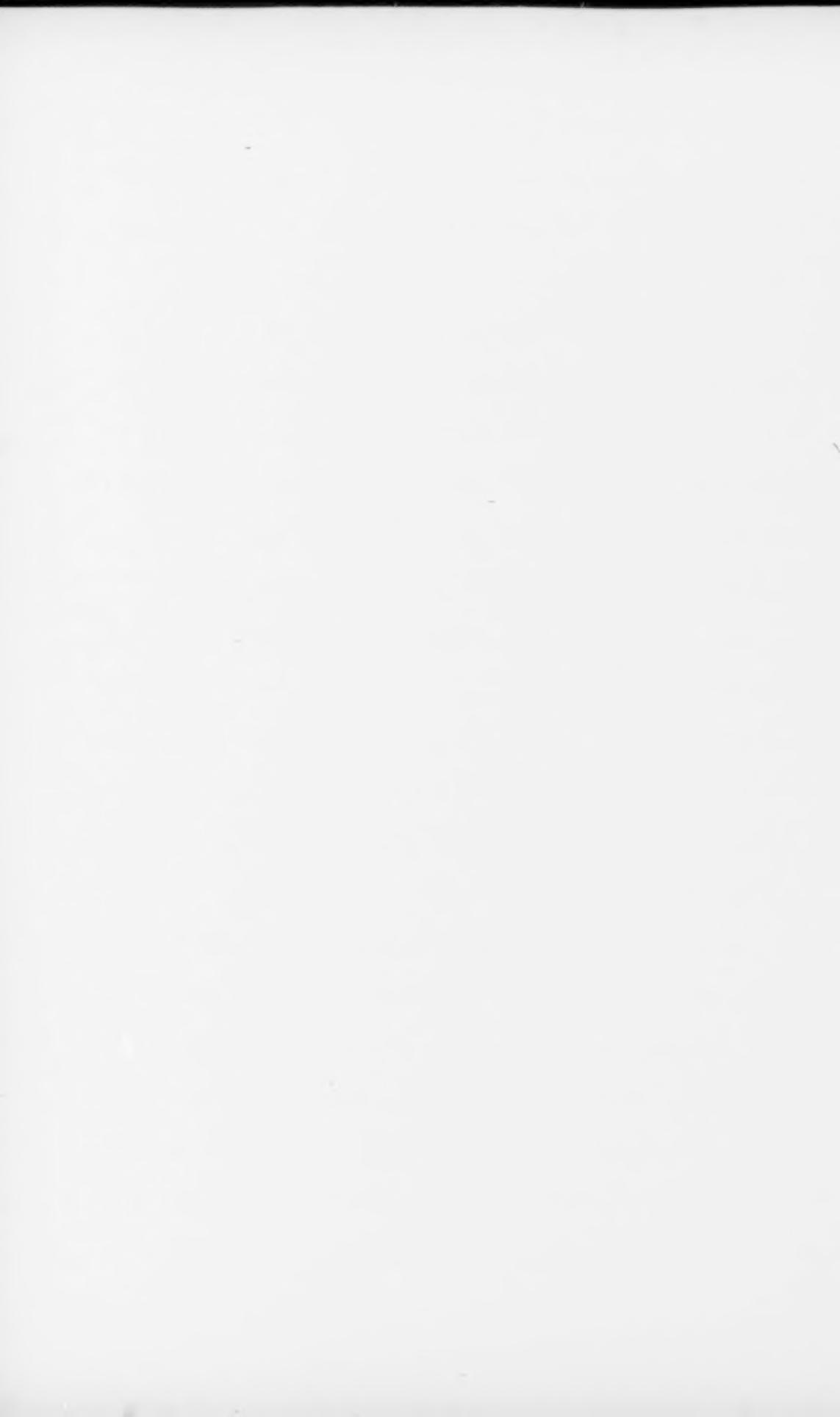
On September 14, 1985, Charles David Johnson was arrested by Erlanger, Kentucky, police officers for possession of drug paraphernalia and cocaine. (Transcript of Proceedings, hereinafter "TP", Commonwealth of Kentucky v. Johnson, Indictment No. 85-CR-195, 11/21/85, p. 25). A search of Johnson's motel room at the Penny Pincher Motel following his arrest revealed, in addition to the drugs and drug paraphernalia, a handgun underneath the bed; a



shotgun; and two (2) ball bats. (TP 11/21/85, p. 16; affidavit in support of search warrant for room 329, Ramada Inn, signed September 17, 1985, at 9:55 p.m.).

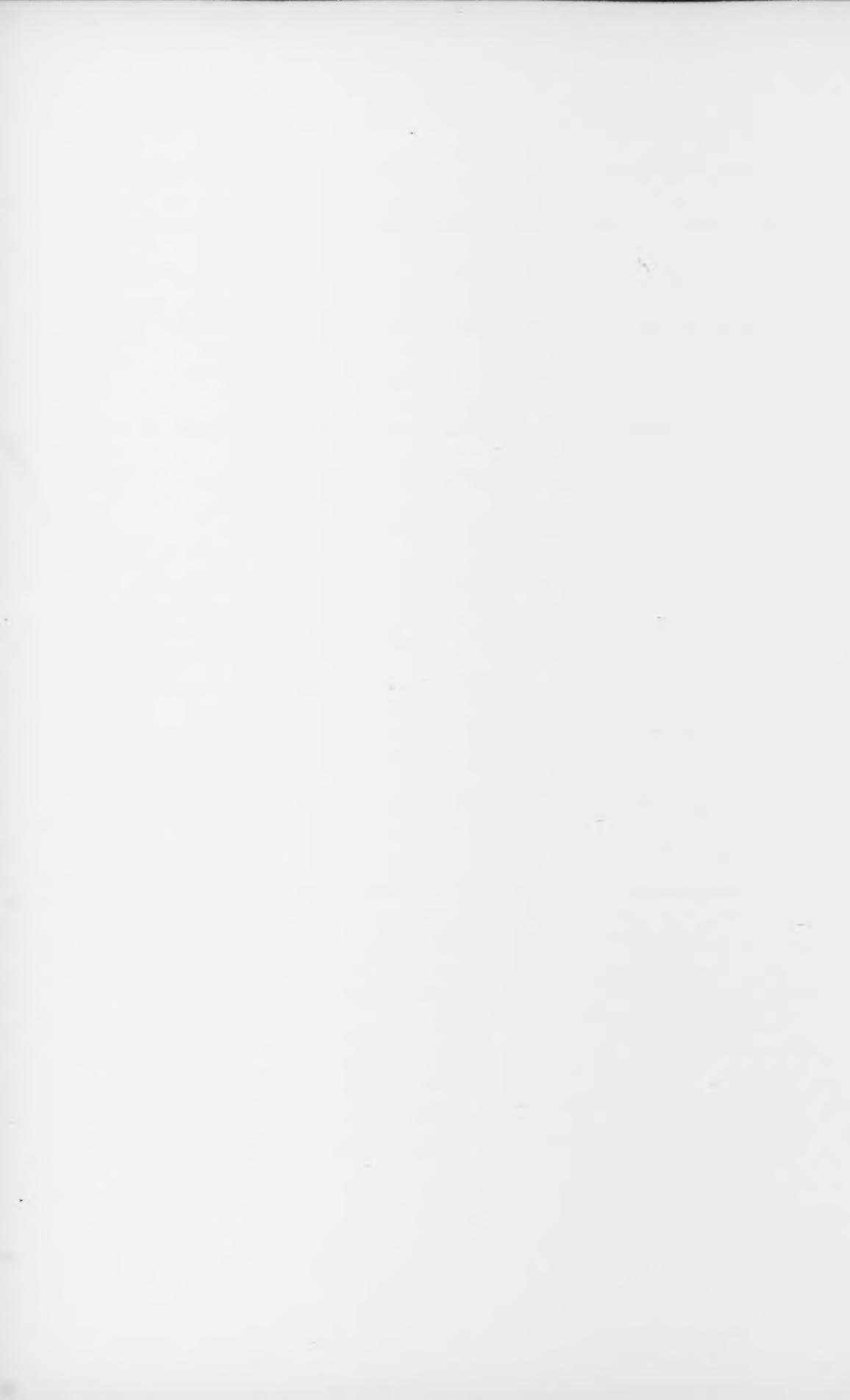
Johnson was subsequently released from custody. On September 17, 1985, Chief Gene Weaver of the Ft. Wright, Kentucky, Police Department was notified that an off-duty officer had observed Johnson acting "in a peculiar manner" at the Ft. Wright Ramada Inn. (TP 11/18/85; 3). Ft. Wright is located approximately five (5) miles from the Erlanger area. (Id., 16). Johnson was observed moving clothes and objects back and forth from the interior to the trunk of his car. "He would stand up, look around the parking lot, go back to doing it, look around again, move to the interior of the vehicle, come back to the trunk again carrying objects." (Transcript of Evidence, hereinafter "TE" 11/26/85; 203).

After confirming that Charles David Johnson was in fact staying at the motel, an officer was



dispatched to the scene along with a dog trained in drug detection. The dog reacted in a manner which indicated he had detected the scent of a controlled substance upon being walked around Johnson's car. (TP 11/18/85, 3-4). A search warrant was obtained for the car. Police officers then went to Johnson's motel room to inform him that a search warrant had been issued for the car, as well as to give him an opportunity to accompany the officers on the search and to provide them with the keys to the car so that breaking the locks would not be necessary. (Id., 4-6).¹

¹Although the Kentucky Court of Appeals opinion in this case states that "the Cadillac had been unlocked all this time", this conclusion was apparently reached through a misinterpretation of Chief Weaver's testimony that "[w]e went to the car. He had the keys in his pocket. The car was unlocked and the search of the car was conducted." (TP 11/18/85, 12). Chief Weaver had earlier testified that the motel room "door was unlocked" after the passkey was obtained. (TP 11/18/85, 8).



When the police officers arrived at Johnson's motel room at approximately 8:30 p.m. (affidavit in support of search warrant for room 329, Ramada Inn), they found the door standing partially open. They knocked on the door. A voice from within called out, "who is it?", and they identified themselves as police officers. Johnson came to the door, opened it some more to look out and, when he saw the police officers, started to close the door. The officers kept him from closing the door, and asked him to open the door back up and step out into the hallway. Johnson stepped out into the hallway and closed the door behind him. (TP 11/18/85, 6-7).

Johnson indicated that he wanted to accompany the officers on the search, but also that he wanted to put on some additional clothes first. He was at that time dressed only in underclothing and a pair of boots. (Id., 7). Since the door had locked when Johnson closed it behind him, a passkey was obtained to unlock the

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door. Johnson attempted to slam the door behind him as he entered the motel room. An officer prevented him from doing so, and two or three officers stepped into the room at that point. Once inside the room, drugs and drug paraphernalia similar to that seized at the Penny Pincher Motel were observed in plain view. The items were located on the "sink area" next to the door. (TP 11/18/85, 10, 14). Johnson put his pants on and went with the officers to the parking lot to observe the search of his car. (TP 11/18/85, 11). Another search warrant was obtained, and the items observed in the motel room were seized. No contraband was found during the search of the automobile. (TP 11/18/85, 12-13).

At the suppression hearing, Chief Weaver testified that before entering the Ramada Inn room "I had information that three or four days prior to this search that a search in Erlanger had revealed weapons there. Also through



conversations of friends and acquaintances of Mr. Johnson's that he was known to carry firearms. Through an arrest in Carbondale, Illinois, that a gun was involved in that arrest also. As well as his prior record of gun involvement and weapons involvement." (TP 11/18/85, 15). Chief Weaver testified that Johnson was not under arrest, but had indicated that he wanted to accompany police officers on the search of the automobile and had to put on some more clothes first. Chief Weaver testified that "we restrained him from closing the door for our own personal safety as well as his." (Id., 7, 9).

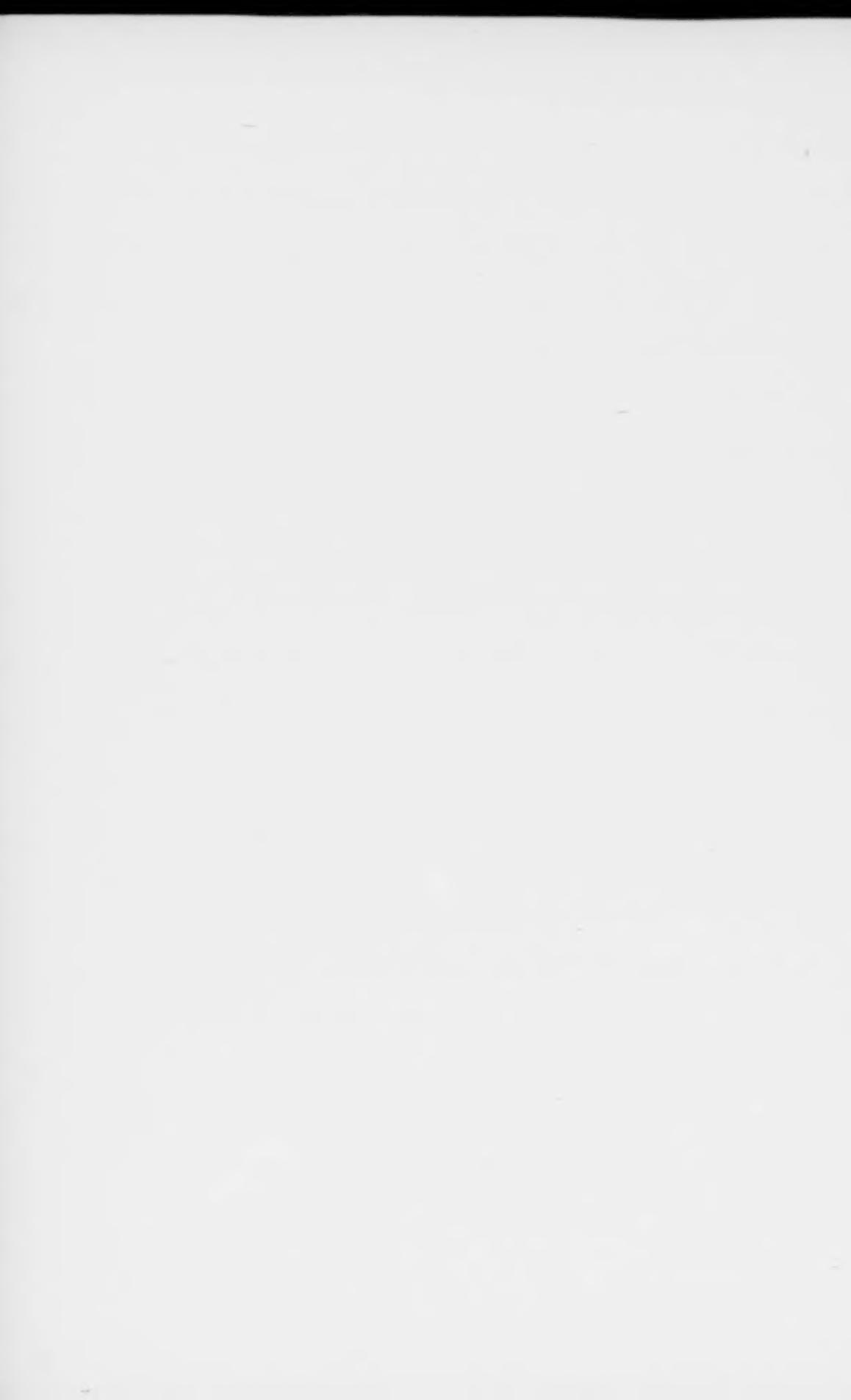
Johnson was tried on charges of trafficking in cocaine and possession of drug paraphernalia. He was convicted of possession of drug paraphernalia and possession of cocaine. Johnson was also convicted of persistent felony offender in the first-degree and sentenced to two (2) concurrent fifteen (15)



year terms of imprisonment on the cocaine charges and two (2) concurrent misdemeanor sentences on the drug paraphernalia charges.

A charge of possession of a handgun by a convicted felon was severed from the drug charges and tried separately. Johnson was convicted of the handgun offense, also, and sentenced to a term of imprisonment of fifteen (15) months to be served consecutively to his other sentences.

In an opinion rendered by the Kentucky Court of Appeals on February 19, 1988, the judgment of the Kenton Circuit Court in both cases was reversed based upon the denial of Johnson's motion to suppress the evidence seized by police at the two motel rooms. Charles David Johnson v. Commonwealth, 86-CA-748-MR and 86-CA-1305-MR. At page 9 of the slip opinion of the Kentucky Court of Appeals, the court concluded that "the forced, warrantless entry into Johnson's Ramada Inn room constituted a



search and seizure within the meaning of the Fourth Amendment." At page 10, the Kentucky Court of Appeals stated "the police could have respected the constitutions and at the same time protected themselves by allowing Johnson his privacy and, upon his return, performing a pat-down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)."

The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review by order entered May 31, 1988. The Kentucky Supreme Court also permitted Johnson to cross appeal on two issues which were raised but not decided by the Kentucky Court of Appeals in its opinion.

On June 8, 1988, the Kentucky Supreme Court rendered an opinion affirming in part and reversing in part the decision of the Kentucky Court of Appeals; and affirming the issues on cross appeal. Commonwealth v. Johnson, 777 S.W.2d 876 (Ky. 1989). The Kentucky Supreme

Court reversed the decision of the Kentucky Court of Appeals with respect to an issue raised concerning the search of Johnson's motel room at the Penny Pincher Motel in Erlanger; the ruling of the Kentucky Court of Appeals on the issue of the entry of police officers into Johnson's Ramada Inn room in Ft. Wright three days later was affirmed by an equally divided court.

Petitions for Rehearing filed by both parties in the Kentucky Supreme Court were denied on November 9, 1989.

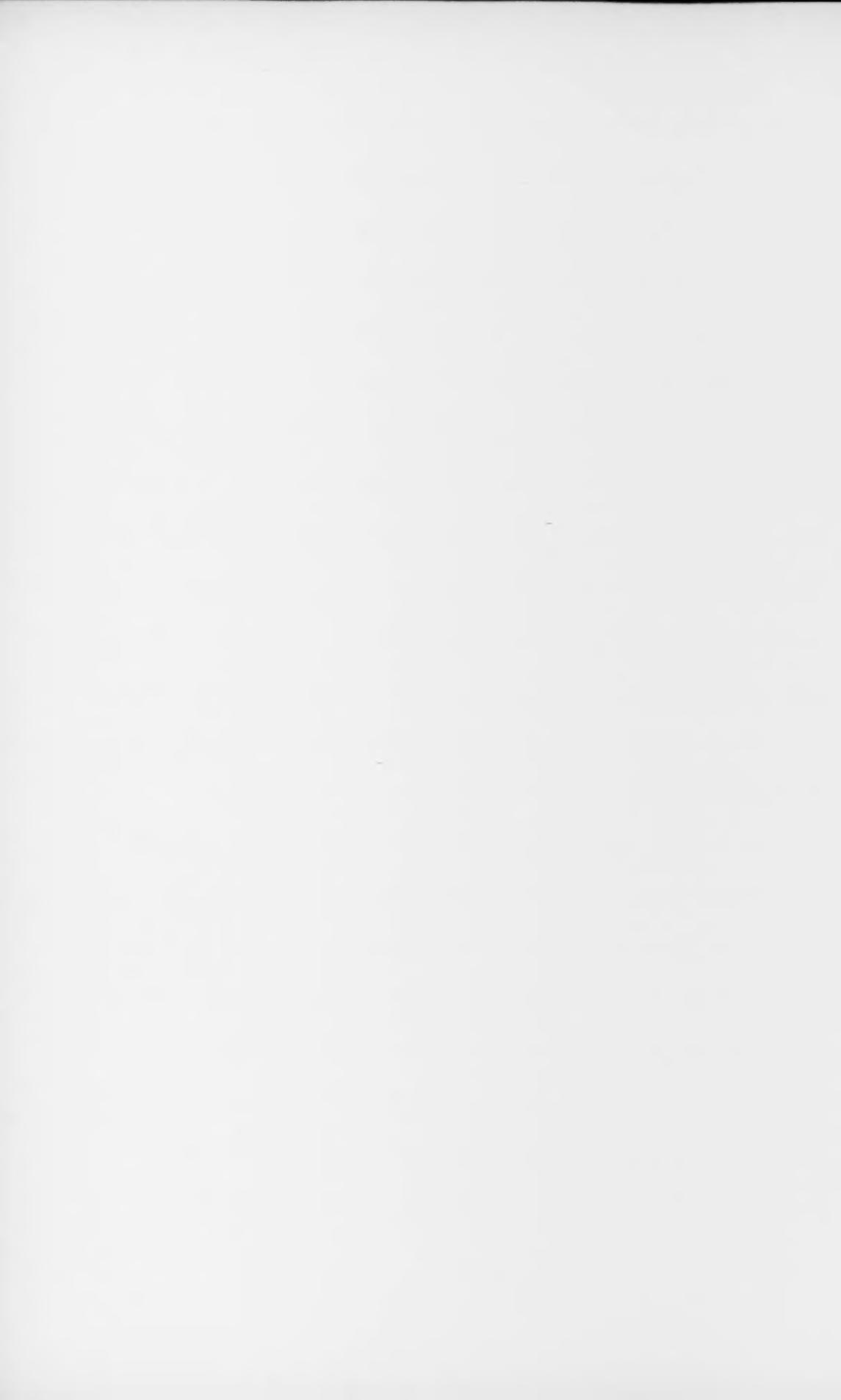
Manner In Which Federal Question Was Raised

In the motion to suppress filed by Johnson in the trial court on November 15, 1985, concerning the seizure of drugs and related items at the Ramada Inn, it was argued that both the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution had been violated when police officers entered Johnson's room. (TR 31-39). Based upon the unrefuted testimony of Chief

Weaver at the suppression hearing, the motion was overruled. (TP 11/18/85; TR 41).

Upon appeal to the Kentucky Court of Appeals, Johnson argued that the trial court "erred by failing to suppress the evidence which resulted from this search since it was obtained by an illegal search and seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky Constitution. More specifically, the police entered [Johnson's] motel room illegally and the items recovered were the fruit of this illegal entry." Brief for Appellant, Johnson v. Commonwealth, 86-CA-748-MR, p. 3.

Writing for a unanimous three-judge panel of the Kentucky Court of Appeals, Judge Dan Jack Combs agreed that the evidence was obtained in violation of Johnson's "rights under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution." Johnson v. Commonwealth, Kentucky Court of Appeals No. 86-CA-195, Slip Op. at 5 (2/19/88).



The Commonwealth of Kentucky sought and obtained discretionary review from the Kentucky Supreme Court, citing cases including Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968) and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) in its brief to argue that the lower court's interpretation of the Fourth Amendment in this case was erroneous. By the time the case was set for oral argument, Judge Combs of the Kentucky Court of Appeals had been elected to serve on the Kentucky Supreme Court. Since he wrote the Kentucky Court of Appeals' opinion in the Johnson case, he did not participate in the decision of the Kentucky Supreme Court.

The opinion of the Kentucky Court of Appeals was affirmed on the Ramada Inn entry issue as the result of a 3-3 split by the Kentucky Supreme Court. Commonwealth v. Johnson, 777 S.W.2d 876 (Ky.1989). Three justices believed the entry was a violation of Section 10 of the Constitution of Kentucky, and expressed no view

on the application of the Fourth Amendment to the Federal Constitution. The remaining three justices declared "a proper interpretation of Section 10 of the Kentucky Constitution and the Fourth Amendment to the Federal Constitution both provide reasonable protection for police" and characterized the police entry at the Ramada Inn as "perfectly reasonable" to assure that Johnson did not emerge with gun in hand.

Johnson, 777 S.W.2d at 882.

In its petition for rehearing, the Commonwealth pointed out that Section 10 of the Kentucky Constitution and the Fourth Amendment to the Constitution of the United States had been construed as being "practically the same" in a previous case, Stephens v. Commonwealth, 552 S.W.2d 181, 183 (Ky.1975).

The state petition for rehearing was denied without comment.



REASONS FOR GRANTING CERTIORARI

I.

GUIDANCE IS NEEDED FROM THIS COURT ON THE CORRECT APPLICATION OF THE PRINCIPLES OF TERRY V. OHIO AND MICHIGAN V. LONG WHERE THE CHALLENGED POLICE CONDUCT INCLUDES ENTRY INTO A DWELLING.

Three Justices of the Kentucky Supreme Court disapproved of police entry into Johnson's motel room in this case, comparing the situation to a warrantless search on the basis of a pretextual arrest. The Court cited the case of Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), and wrote that "a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement." Commonwealth v. Johnson, 777 S.W.2d at 880.

The Fifth Circuit Court of Appeals in Amador-Gonzalez based its 1968 decision upon a subjective test which invalidated the search

because the officer involved admitted at the suppression hearing that he was looking for drugs when he arrested the defendant for a minor traffic violation. 391 F.2d at 313. Therefore, the court reasoned, "the arrest, no matter how lawful in itself, cannot support the search." 391 F.2d at 314.

The Commonwealth pointed out in its state court petition for rehearing that the Fifth Circuit Court of Appeals overruled Amador-Gonzalez in 1987. In the case of United States v. Causey, 834 F.2d 1179 (1987), the Fifth Circuit Court of Appeals discussed several cases from the United States Supreme Court in concluding that so long as police do no more than they are objectively authorized and legally permitted to do, their motives are irrelevant and hence not subject to inquiry. 834 F.2d at 1184. The Ninth Circuit Court of Appeals, however, still uses a subjective test. United States v. Smith, 802 F.2d 1119, 1124 (1986).



Either way, with respect to Charles David Johnson the entry was proper because Chief Gene Weaver expressly denied that they entered Johnson's room for the purpose of gaining evidence against him. (TP 11/18/85, 14). Such testimony is especially credible because, at the time of the entry, the police officers had every reason to believe that at least some quantity of a controlled substance was located in Johnson's automobile. The police officers already had a search warrant for the automobile, and could anticipate having probable cause to arrest Johnson following the automobile seach.

The assertion in the Kentucky Court of Appeals' opinion that "the police could have respected the constitutions and at the same time protected themselves by allowing Johnson his privacy and, upon his return, performing a pat-down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)" is an alarming interpretation of Terry.



It also ignores the interpretation of Terry in later cases by this Court including Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and Adams v. Williams, 406 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 616 (1972). In Long, at 463 U.S. 1047, it was pointed out that Terry need not be read as a restricting a preventative search to the person of the detained suspect. Both Long and Williams indicate that police officers may take reasonable action to insure their safety. Police officers should not be required to give suspects repeated opportunities to gain access to weapons especially where, as here, the suspect has consented to continuing contact with police officers (Johnson was not under arrest and could have refused to accompany police to the parking lot if he wished, TP 11/18/85, 8); he is known to have had a gun (under his bed) only three (3) days earlier; and he has indicated his intent to rejoin the officers.



A number of variations on this issue have appeared in state and federal courts in the past few years, and will undoubtedly arise in the future. In State v. Mayfield, 10 Kan.App.2d 175, 694 P.2d 915 (1985), police were called to an apartment building to investigate a report of an individual knocking on the caller's door for twenty (20) minutes. Police officers who responded to the call found the defendant standing in the hallway near the caller's door. After being asked to produce identification, the defendant became belligerent and argued with police, but finally agreed to get some identification from his apartment. The police officers followed Mayfield into his apartment, and once inside observed a "hash" pipe in plain view. The Kansas Court determined that the officers acted properly, and since the defendant at no time refused to furnish identification or break off the interview the continuation of the confrontation or custodial relationship between

the defendant and the officers was at least with the tacit consent of the defendant. Mayfield, 694 P.2d at 918. The Kansas Court concluded that "clearly the officer would have been without good sense . . . not to stick to [Mayfield] pretty closely just for his own safety." (Id.) See also, Commonwealth v. Daniels, 218 Pa.Super. 278, 421 A.2d 721 (1980).

Virginia's Court of Appeals has applied the Terry and Long cases to uphold the actions of police officers who entered a suspect's motel room while monitoring his movements following a Terry stop. Servis v. Commonwealth, 371 S.E.2d 156 (1988). The Servis court notes the case of State v. Davis, 295 Or. 227, 666 P.2d 802 (1983), as reaching a contrary result in a similar situation.

Recent cases by United States Courts of Appeal have approved of a "protective" search

and seizure in some circumstances, United States v. Johnson, 637 F.2d 532, 535, (8th Cir. 1980); and have concluded that certain containers such as briefcases may be searched by police pursuant to a Terry stop in order to prevent "a dangerous scuffle for access to the weapon." United States v. McClinnhan, 660 F.2d 500, 504 (D.C. Cir. 1982). The District of Columbia Court of Appeals upheld the actions of a police officer in following an individual from the street into an apartment in order to make a "Terry" stop. Edwards v. United States, 364 A.2d 1209 (1977).

The decision of the Kentucky courts aside from being erroneous, penalizes police officers for taking reasonable steps to insure their safety. Rather than deterring unlawful police conduct, it only penalizes appropriate and lawful decisions made under circumstances which severely limit the opportunities for reflection and consideration of alternatives. A decision from this Court is needed not only to correct

the error in this case, but to resolve the conflicting interpretations of Terry rendered by various state and federal courts in other, similar, cases involving police entry into a dwelling.

CONCLUSION

Wherefore, the Commonwealth of Kentucky respectfully petitions this Court for a writ of certiorari to the Kentucky Supreme Court.

Respectfully submitted,

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